BRIEF IN SUPPORT OF PETITION.

Opinions of the Court Below.

The opinion of the District Court is not officially reported. It is printed in the Transcript of Record at page 18. The opinion of the Circuit Court of Appeals for the First Circuit is reported in 114 F. (2d) 969.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U. S. C. A. 347 (a). The judgment of the United States Circuit Court of Appeals for the First Circuit was entered October 16, 1940 (R. 62).

Questions Presented.

The questions presented are stated in the Petition filed herein.

Statutes Involved.

The constitutional provisions, the treaties and the statutes involved in the determination of this case are set out in the Appendix and are as follows:

The Fifth and the Fourteenth Amendment to the Constitution;

Article VI of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden, signed May 25, 1935, 49 Stat., Part 2, 3755;

Paragraph 1 and paragraph 22 of Section 2 of the Organic Act of Puerto Rico, approved March 2, 1917, c. 145, 39 Stat. 951, 48 U. S. C. A. 737;

Paragraph 2 of Section 3 of the Organic Act of Puerto Rico, as amended March 4, 1927, c. 503, Section 1, 44 Stat. 1418, 48 U. S. C. A. 741 (a);

Subdivision 7 of Section 16 of Act No. 85, of the Legislature of Puerto Rico, approved August 20, 1925 (Laws of 1925, p. 585), as amended by Act No. 146, approved May 9, 1938 (Laws of 1938, p. 325); and

Section 108 of Act No. 85, of the Legislature of Puerto Rico, approved August 20, 1925 (Laws of 1925, p. 585).

ARGUMENT.

Point I.

The invalidity of portions of a statute does not affect separable, divisible and independent provisions thereof if self-sustaining and enforceable without regard to the objectionable portions.

In the exercise of its taxing powers, the Legislature of Puerto Rico passed the "Internal Revenue Law of Puerto Rico", selecting numerous articles upon which an excise tax was levied, omitting many others, and in so doing acted within these powers. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 55 L. Ed. 389; *Bromley* v. *McCoughn*, 280 U. S. 124, 74 L. Ed. 226.

Subdivision 7 of Section 16 of the said "Internal Revenue Law of Puerto Rico", besides levying a tax on uncolored SQUARE stick and ROUND stick matches, packed in boxes with wooden outers or shucks, containing not less than 25 but not more than 50 sticks, levies a tax on:

1. Colored or fancy ROUND and SQUARE stick matches, packed in boxes with wooden outers or shucks, containing not less than 25 but not more than 50 sticks per box (Subdivision B and C).

2. Matches colored or uncolored, regardless of whether ROUND or SQUARE sticks, packed in boxes with

other than wooden outers or shucks, containing not less than 25 but not more than 50 sticks per box or containing less than 25 and more than 50 sticks per box. (Paragraph 6 of Subdivision 7.)

3. Paper or cardboard matches in boxes of 20 matches each, and paper and cardboard matches in boxes of more than 20 matches or less than 20 matches each. (Paragraph 7 of Subdivision 7.)

4. Wooden matches sold in the form of books. (Paragraph 8 of Subdivision 7.)

5. Sperm or wax matches. (Paragraph 9 of Subdivision 7.)

It appears that a separate classification was made of each of different kinds of matches and a distinct tax imposed on every class, in the levying, assessment or collection of which tax, no dependency exists between them, and therefore full effect may be given to the valid tax exactions contained in the said statute wtih reference to any of the different kinds or classes of the matches in question, under the rule that distinct taxes imposed by a single statute are not to be deemed inseparable unless that conclusion is unavoidable. *Marshal Field & Co.* v. *Clark*, 143 U. S. 649, 36 L. Ed. 294; *Sonzinsky* v. *United States*, 300 U. S. 506, 81 L. Ed. 772; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245.

The invalidity, because discriminatory, of the excise tax levied upon the uncolored SQUARE stick matches involved in this suit, affects only so much of the Act of 1938, amending Subdivision 7 of Section 16 of the "Internal Revenue Law of Puerto Rico", as refers to the said uncolored SQUARE stick matches, and nothing else, more so if we take into consideration the statutory declaration contained in Section 108 of the aforementioned Law as to separability of any invalid portion of the Act which creates the pre-

sumption that eliminating any invalid part thereof, the Legislature would have been satisfied with what remained. *Champlin Ref. Co.* v. *Corporation Commission*, 286 U. S. 210, 76 L. Ed. 1062; *Electric Bond & Share Co.* v. *Security & Exchange Commission*, 303 U. S. 419, 82 L. Ed. 936.

In *Hill* v. *Wallace*, 259 U. S. 66 L. Ed. 822, it is said that such legislative declaration serves to assure the courts that separate sections or provisions of a partly invalid Act, may be properly sustained:

> "Without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of parts."

In the light of this declaration, the presumption is that the legislature intended the Act to be divisible, and this presumption must be overcome by considerations which make evident the inseparability of its provisions and the clear probability that the invalid part, being eliminated, the legislature would not have been satisfied with what remains. *William* v. *Standard Oil Co.*, 278 U. S. 235, 242, 73 L. Ed. 287, 309; *Ohio Tax Case*, 232 U. S. 576, 58 L. Ed. 737.

In the case of *Field* v. *Clark*, 143 U. S. 252, 36 L. Ed. 294, involving unconstitutional features of a tariff law, these were ignored and the remainder held valid, this Court saying:

> "* * * But it cannot be assumed, nor can it be made to appear from the Act, that the provisions imposing duties on imported articles would not have been adopted except in connection with the clause giving bounties on the production of sugar in this country. These different parts of the Act, in respect to their operation, have no legal connection whatever with each other. They are entirely separable in their nature, and, in law, are wholly independent of each other. One relates to the imposition of duties upon imported articles; the other, to the appropriation of money from

the Treasury for bounties on articles produced in this country. While, in a general sense, both may be said to be parts of a system, neither the words nor the general scope of the Act justifies the belief that Congress intended they should operate as a whole, and not separately for the purpose of accomplishing the objects for which they were respectively designed. Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country."

In the case of *Corn* v. *Fort*, 95 S. W. (2d) 620, the statute in question levied a tax upon corporations, partnerships and trusts for the privilege of engaging in business within the state, specifically excluding from its operation individuals engaging as such in business. The Court found this classification arbitrary and capricious as regards partnerships but upholding the validity of the tax imposed upon corporations said:

"The act classifies four entities and makes them subject to a tax for the privilege of doing business in this state. Anyone of the entities so classified could have been omitted without impairing the validity of the Act as to those included. There can be no speculation as to whether or not the Legislature would have passed the act without the unconstitutional portion for it has specifically declared that it would have enacted the statute with such portion elided. The inclusion of partnerships in the classification is clearly severable, and the fact such inclusion was invalid cannot affect the validity of the balance of the act. State *v.* Scott, 98 Tenn. 259, 39 S. W. 1; State *ex Rel. v.* Cumming, 99 Tenn. 667, 42 S. W. 880; Fite *v.* State, 114 Tenn. 646, 88 S. W. 941; H. G. Hill Co. *v.* Whitice, 149 Tenn. 168, 258 S. W. 407; Williams *v.* Standard Oil Co., 278 U. S. 235, 73 L. Ed.

287." See also *Diamond Co.* v. *United States,* 187 U. S. 611, 47 L. Ed. 382; *Berea College* v. *Kentucky,* 211 U. S. 45, 53 L. Ed. 81.

The general rule is that the validity of any part of a statute cannot be impaired because some other part thereof may be found invalid, if wholly separable or divisible specially when the objectionable part can be eliminated and the balance is capable of being carried out, unless the different parts of the statute are so mutually connected with and dependent on each other as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, that it would have not passed the residue independently. *Pollock* v. *Farmer's Loan & T. Co.* (Income Tax cases), 158 U. S. 601, 39 L. Ed. 1108; *Wilcox* v. *Consolidated Gas Co.* 212 U. S. 19, 53 L. Ed. 382; *Bowman* v. *Continental Oil Co.,* 256 U. S. 647, 65 L. Ed. 1145. As was said in *People ex Rel. Barrett* v. *Union Bank & Trust Co.,* 199 N. E. 272:

> "That part of statute is unconstitutional does not authorize courts to declare remainder void unless all provisions are connected in subject-matter, depending on each other, operating together for same purpose, or are otherwise so connected in meaning that it cannot be presumed that Legislature would have passed the one without the other."

The test of severability, quoting from *Rutenberg* v. *City of Philadelphia,* 196 A. 73, 329 Pa. 26, may be stated as follows:

> "After the unvalid portion of the acts has been stricken out, whether that which remains is self-sustaining and is capable of separate enforcement, without regard to that portion of the statute which has been cast aside. If this be true, the statute should be

sustained to the extent of that which remains. See also Andrain County *v.* Hackmann, 205 S. W. 12, 275 Mo. 534."

Applying the foregoing test to the statute in question striking therefrom the discriminatory provisions contained therein, as found by the Court below, subdivision 7 of Section 16 of the Internal Revenue Law of Puerto Rico, would read as follows:

"Section 16. There shall be collected and paid, once only, an internal revenue tax on each of the following articles:

"7. MATCHES: On matches, whether sulphur, safety, friction or fuses, or by whatever name known, sold, manufactured, transported, transferred, used or consumed in, or brought into Puerto Rico, there shall be levied and collected an excise tax as follows:

"When the matches are in boxes with other than wooden outers or shucks, containing not less than twenty-five (25) matches nor more than fifty (50) matches per box, there shall be levied and collected an excise tax of thirty-six (36) cents a gross of one hundred and forty-four boxes; when the box contains less than twenty-five (25) matches or more than fifty (50) matches there shall be levied and collected an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On paper or cardboard matches in books of twenty (20) matches each, there shall be levied and collected an excise tax of five (5) cents on each thousand matches or fraction of a thousand. Books containing more than twenty (20) matches or less than twenty (20) matches, shall pay an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On wooden matches sold in the form of books, there shall be levied and collected an excise tax of six (6) cents on each thousand matches or fraction of a thousand.

"On sperm or wax matches there shall be levied and collected an excise tax of five (5) cents on each thousand matches or fraction of a thousand."

We submit that the foregoing statute would be self-sustaining and enforceable, and since the objectionable and discriminatory portions of the amendatory Act of 1938, are separable, divisible and independent from the rest thereof, they may be considered as elided or stricken off the said statute, and therefore, as the remaining valid portions provide no tax on the matches involved in this suit, the petitioner is entitled to be refunded of the whole amount which was collected by the respondent under the guise of a tax exaction that has been found to be invalid.

Point II.

In the construction of a statute the judiciary is not empowered to encroach on legislative functions.

As the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction is that the courts shall, by all aids available, ascertain and give effect, to the intention or purpose of the legislature as expressed in the statute, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state. Furthermore, when the validity of an act of the legislature is drawn in question, the courts will first ascertain whether a reasonable construction of the statute is fairly possible, in order to save it from unconstitutionality and to bring it within the fundamental law. *Crowell* v. *Benson*, 285 U. S. 22, 62, 76 L. Ed. 589, 619.

Both the District Court and the Circuit Court of Appeals construed the statute involved in this suit as levying a uniform tax of 10 cents per gross of 144 boxes, on all uncolored stick matches, without distinction between ROUND or SQUARE sticks, which were considered as LIKE or SIMILAR

articles within the purviews of Article VI of the Reciprocal Commercial Trade Agreement between the United States and the Kingdom of Sweden, and the provisions of paragraph 2 of Section 3 of the Organic Act of Puerto Rico (R. 30, 57).

In reaching this conclusion both Courts only considered those portions of the amendatory act levying a tax on uncolored stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box, the ROUND stick being burdened with a tax of 10 cents per gross of 144 boxes, and the SQUARE stick being burdened with a tax of 30 cents per gross of 144 boxes, which tax was equalized, as aforesaid, to 10 cents for both ROUND and SQUARE stick matches.

If the only objection against the statute, as regards the SQUARE stick matches involved in this suit, had been the aforementioned discriminatory assessment in favor of ROUND stick matches, the construction adopted by both courts would be fair, reasonable and within the legislative intention to tax them at least as much as it could constitutionally do—*Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, 52 L. Ed. 272, and besides precedent would have the added merit of reason and reliance on substance rather than on form. *Blanco* v. *Sancho Bonet*, Treas., 55 D. P. R. 389 (Spanish Edition); *Benjamin Franklin Thrift Stores, Inc.* v. *Henneford*, 187 Wash. 472, 60 P. (2d) 86; *Wiley* v. *Parmer*, 14 Ala. 627; cf. *State* v. *Lee*, 122 Fla. 639, 166 So. 249; *Century Oil Co.* v. *Department of Agriculture*, 112 Neb. 73, 198 N. W. 569. See *Miles* v. *Department of Treasury*, 209 Ind. 172, 195, 199 N. E. 372, 382; 50 Harvard Law Review 535.

But the challenged statute, as found both by the District Court (R. 24) and by the Circuit Court of Appeals (R. 49), had left untaxed uncolored SQUARE or ROUND stick matches packed in wooden boxes containing less than 25 or more

than 50 matches per box and if the petitioner is entitled to be taxed at no higher rate than are those in like circumstance as held by the Circuit Court of Appeals (R. 58), the SQUARE stick matches involved in this action should have been also left untaxed, because other SQUARE or ROUND stick matches, as above set forth, were left without any tax at all. The fact that the Legislature of Puerto Rico after the tax on the matches involved in this suit had been levied and collected, may have amended again subdivision 7 of Section 16 of the Internal Revenue Laws of Puerto Rico (Law No. 14, approved September 9, 1938 (R. 24, 49) to include the matches originally left untaxed, did not validate the discriminatory provisions challenged, because, as aforesaid, the tax involved in this action had been levied and collected under the prior Act No. 146, approved May 9, 1938 (R. 3, 11).

We submit that the discrimination in favor of ROUND or SQUARE stick matches packed in boxes containing less than 25 or more than 50 sticks per box, which were left untaxed, as against the identical article packed in boxes containing not less than 25 but not more than 50 sticks per box, is, as held by the District Court (R. 29), palpable unfair and unjust. *Liggett* v. *Lee*, 288 U. S. 517, 77 L. Ed. 929; *Schesinger* v. *Wisconsin*, 270 U. S. 230, 70 L. Ed. 577; *Louisville Gas & E. Co.* v. *Coleman*, 277 U. S. 32, 72 L. Ed. 770.

In construing the challenged statute as levying a tax of 10 cents per gross of 144 boxes on the matches involved in this suit, both the District Court and the Circuit Court of Appeals attempted to effect the legislative intention of taxing SQUARE stick matches at least as heavily as ROUND stick matches (R. 34, 59) but that tax to be uniform and valid, would require an equal assessment on those same, identical matches left untaxed by the statute in question which can not be done as it would imply an encroachment

on clear legislative functions and for this reason that construction is not reasonably possible.

Conclusion.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the First Circuit should be reviewed by this Court for the "Reasons Relied Upon for the Allowance of the Writ" and that the judgment of the said Court be modified to allow the petitioner the additional refund of the $8,800.00 claimed.

Respectfully submitted,

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